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No. 01-1229

IN THE

Supreme Court of the United States

PIERCE COUNTY,

Petitioner,

v.

IGNACIO GUILLEN as Legal Guardian for JENNIFER GUILLEN and ALMA GUILLEN, minors; and MARIANO GUILLEN, as Legal Guardian for PAULA GUILLEN and FATIMA GUILLEN,

Respondents.

On Writ of Certiorari to the Supreme Court of Washington

BRIEF OF *AMICUS CURIAE* THE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether 23 U.S.C. § 409, which protects specified information "compiled or collected" in connection with certain federal highway safety programs from being subject to discovery, admitted into evidence, or being considered for any other purpose in any federal or state action for damages, is a valid exercise of Congress' power pursuant to the Spending Clause, the Commerce Clause or the Necessary and Proper Clause of the United States Constitution?

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BRIEF OF *AMICUS CURIAE* THE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

The Association of American Railroads ("AAR") is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 75 percent of the rail industry's line haul mileage, produce 93 percent of its freight revenues, and employ 91 percent of rail employees. In

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[1] The parties have consented to the filing of this brief, and written letters of consent have been filed with the Court. No counsel of a party has authored this brief in whole or part, and no person or entity, other than *amicus curiae* or its members or counsel, has made a monetary contribution to the preparation or submission of this brief.

matters of significant interest to its members, AAR frequently appears before Congress, administrative agencies, and the courts on behalf of the railroad industry.

Vigorous enforcement of 23 U.S.C. § 409 is a matter of substantial concern to railroads because it plays an important role in the federal government's effort to promote railroad crossing safety. Section 409 specifically exempts from discovery or admission into evidence certain information "compiled or collected for the purpose of" promoting railway-highway crossing safety pursuant to 23 U.S.C. § 130 ("Section 130 program"). Section 130 makes federal funds available for use in improving safety at railway-highway crossings. Congress chose to exempt this information from use in civil litigation to ensure that the program most effectively promotes safety. To deny § 409 its full effect adversely affects railroads in two ways. First, by increasing the cost to States and railroads of collecting and compiling this critical safety-related information, the Washington Supreme Court undermines the efficacy of the programs directed towards improving rail safety. Second, contrary to Congress' intent, railroads are exposed to damages based on information that the railroads themselves collect and submit to state agencies (and the Federal Railroad Administration) for compilation in an effort to promote highway safety under the Section 130 program.[2]

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[2] The National Rail-Highway Grade Crossing Inventory was begun by the Department of Transportation (through the Federal Railroad Administration) in conjunction with AAR in the early 1970s. Every railroad grade crossing, public and private, was identified, numbered, and more than 40 items of information were initially collected on a USDOT-AAR form for each crossing. Under the U.S. Dep't of Transp., *National Railroad-Highway Crossing Inventory Update Manual* (1976) ("Update Manual"), updating is required for the data in each specific inventory category, some by the state agency and some by the railroad, on a rational source basis. *See, id.* tbl.1, at C-3. For example, railroads are required to update changes in train speed, number of tracks, and train movements per day, while states are required to update changes in the type of land and/or development near the crossing, and changes in the average number of vehicles and percentage of trucks per day. Typically, State collections include this information, accident history, and other records, including correspondence inspection records and hazard ratings, as well as other information deemed necessary for decision making.

STATUTORY BACKGROUND

The statute under review, 23 U.S.C. § 409, is a crucial component of three distinct federal highway safety programs: The Railway-Highway Crossing Program (§ 130), The Highway Bridge Replacement Program (§ 144), and The Hazard Elimination Program (§ 152). These programs were created by federal highway legislation that displaced a traditionally political process for identifying and funding highway projects with a new, data-driven, administrative model for prioritizing highway safety projects.

These federal highway safety programs have had a substantial impact on public safety and have promoted commerce throughout the nation for 30 years. Developed in the 1970s in response to an "escalating tide of mayhem on our highways," these safety programs were designed to reduce the distressing losses in lives and money that plagued our highway system. H.R. Rep. No. 93-118 (1973), *reprinted in* 1973 U.S.C.C.A.N. 1859, 1888-89 (noting that in 1972 the nation lost over $40 billion and 56,000 lives, and more than 4 million persons were injured.) With respect to the issue of particular concern to *amicus*, railway-highway crossings, the results have been dramatic. In the late 1970s, there were an average of 864 fatalities and 11,516 accidents per year. U.S. Gov't Accounting Office, *Report to Congressional Requesters, Railroad Safety: Status of Efforts to Improve Railroad Crossing Safety* 18 (Aug. 1995) ("GAO Report"). By the year 2001, despite an increase in traffic, fatalities were reduced by more than one-half and accidents by more than two-thirds. U.S. Dep't of Transp., *Highway-Railway Crossing FRA Safety Quick Statistics*, *at* http://safetydata.fra.dot.gov/

OfficeofSafety/Default.asp?page=stats.asp (visited June 19, 2002). The federal government estimates that the Railway-Highway Crossing Program, codified at 23 U.S.C. § 130 ("the Section 130 program") had, by May 1994, "prevented more than 7,600 fatalities and 33,500 nonfatal injuries." GAO Report, at 18.

These stunning results are the product of a deliberately cooperative approach among public and private entities concerned about public safety. The Secretary of Transportation in 1972 concluded that an effective effort to improve railroad crossing safety would require "national coordination." Federal R.R. & Highway Admins., U.S. Dep't of Transp., *Railroad-Highway Safety Part II: Recommendations for Resolving the Problem* iii (1972). Congress agreed, noting "the necessity for improved coordination and cooperation on a program and project level between Federal, State and local authorities, and between the public and private sectors"; only such a coordinated approach could provide the "multi-pronged attack on those highway-related factors which contribute most to accidents." H.R. Rep. No. 93-118, *reprinted in* 1973 U.S.C.C.A.N. at 1889.

Congress began its effort to coordinate the highway safety efforts of federal, state and local officials in 1966. The Highway Safety Act of 1966, Pub. L. No. 89-564, 80 Stat. 731, directed federal officials

> "to encourage and assist each of the States in the establishment of a highway safety program based on a comprehensive statewide plan ... which ... shall include ... provisions for an effective accident record system ... and surveillance of traffic for detection and correction of high or potentially high accident locations."

S. Rep. No. 89-1302 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2741, 2741. Congress extended its effort to change the way the nation responded to the problem of highway safety with

the Federal-Aid Highway Act of 1970. In that legislation, Congress mandated that any State participating in the federal highway program establish "a State agency which shall have adequate powers, and be suitably equipped and organized to carry out" the program. Pub L. No. 91-605, § 203(a), 84 Stat. 1713, 1741 (1970) (amending 23 U.S.C. § 402(b)(1)(A)). At that time, Congress established the first of the three programs specifically referenced in 23 U.S.C. § 409: The Highway Bridge Replacement Program. Codified at 23 U.S.C. § 144, the program called for the States and the federal government to "inventory all bridges located on any of the Federal-aid systems ...[, to] classify them according to their serviceability, safety, and essentiality for public use; and ... based on that classification, assign each a priority for replacement." Pub. L. No. 91-605, § 204(a), 84 Stat. at 1742.

Congress thus established a three-step procedure for "targeting" federal funds "to the greatest need." GAO Report at 4. First, identify all relevant highway locations. Second, prioritize individual locations in terms of public importance and safety risks presented. Third, direct funds to those locations that promise the greatest public safety return on the public's investment. This model was carried forward into the Railway-Highway Crossing Program, 23 U.S.C. § 130(d) (requiring the States to "systematically maintain a survey of all highways to identify those railroad crossings which may require [attention] and establish and implement a schedule of projects for this purpose"), and the Hazard Elimination Program, *id.* § 152(a) (requiring the systematic gathering of data and prioritizing of safety-related projects).

To succeed, however, this model requires the sustained effort of State and industry officials. The crucial data-gathering function falls principally on the States. For example, the regulations enacted pursuant to § 130 require the States, *inter alia*, to "collect[] and maintain[]" the relevant crossing traffic and safety data at crossings, 23 C.F.R. § 924.9(a)(1), and to create a "record of accident experience

before and after the implementation of a highway safety improvement project," *id.* § 924.13(a)(2).[3] The § 152 program also places primary data-gathering responsibilities on the States, 23 U.S.C. § 152(a), while the § 144 program requires the Secretary of Transportation, working with the States, to gather the relevant information related to bridges, *id.* § 144(b)-(c).

Private entities (especially ra play a crucial role in the Section 130 Progra Department of Transportation has recognized that while "local, State, and Federal agencies have collected and maintained information about railroad-highway crossings, most crossing information systems [had in 1976] been fragmented and incomplete." Update Manual at B-1. Because railroad crossing safety data "can continue to be useful only if maintained and updated" as incidents occur, *id.* at A-1, the Department of Transportation solicited and received the cooperation of the railroad industry in the data-gathering endeavor. The railroads and the government, for example, equally shared the cost of developing a "'Comprehensive National Railroad-Highway Crossing Information and Numbering System.'" *Id.* at B-1. The Update Manual establishes procedures that are "designed to ensure availability and use of an up-to-date railroad-crossing data base and to ensure continued use of the channels of communication [between various public and industry entities] established during the initial inventory," and

[3] Central to the overwhelming success of the Section 130 program is its regulatory scheme of ensuring that the most dangerous grade crossings are updated first, by requiring that the States prioritize grade crossing improvement projects using relative hazard rankings required by 23 C.F.R. §§ 924.9-.11; Federal Highway Admin., U.S. Dep't of Transp., *Railroad-Highway Crossing Handbook* § III (1986) ("Assessment of Crossing Safety and Operation") (discussing approved mathematical formulae dependent on the update information). This is why it is imperative that comprehensive information relevant to the safety of each crossing be supplied by all participants in an uninhibited way.

allocates specific data collection and updating tasks to the States and to the railroads. *Id.* at C-1, C-3 & tbl.1. Finally, federal law requires the railroads to report all accidents on railway-highway crossings to the Department of Transportation. 49 U.S.C. § 20901(a).[4]

Congress has determined that the continuing effectiveness of the federal highway safety programs is undermined by tort litigation. As discussed above, the programs depend for their success on comprehensive data-gathering and analysis. But, because resources are limited, not all sites are deemed of sufficient priority to receive funds for improvement immediately; this is a long-term effort in which even known, risky situations must be left unaddressed for periods of time so that adequate resources would be available for the locations posing the greatest dangers to life and health. The result, as the Solicitor General has previously observed, is a concern that parties "will likely be deterred from compiling complete and accurate information about ... hazards," weakening the effectiveness of federal safety programs. Brief for the United States as *Amicus Curiae* at 6, *State of Alabama Highway Dep't* v. *Boone*, No. 90-1412 (U.S. 1991). The statute under review, 23 U.S.C. § 409 grew out of a proposal by the Federal Highway Administration, made at the behest of the States, to address precisely this fear. *Id.* at 10.

Section 409 ensures that the safety related information collected and compiled by the States and private entities is not used as a tool in private litigation against the very parties assisting the public safety effort. In short, Congress has determined that the benefit to public safety of nondisclosure outweighs the interests individual plaintiffs have in access to

[4] A copy of the Federal Railroad Administration's form FRA F6180.71, the U.S. DOT Crossing Inventory Form, and form FRA F6180.57, for reporting railway-highway crossing accidents, are available at http://safetydata.fra.dot.gov/OfficeofSafety/Forms/Default.asp (visited June 19, 2001).

this information. *Coniker* v. *State*, 695 N.Y.S.2d 492, 495 (N.Y. Ct. Cl. 1999).

The importance of § 409 to the effectiveness of the federal highway programs is demonstrated by Congress' consistent attention to how that statute has been read by the courts over the years. Section 409 has, occasionally, received a hostile reception in State courts, which have applied it narrowly and undermined its effort to promote the data-gathering effort.

For example, before 1991, § 409 specifically excluded the protected material from admission in evidence, but was silent about discovery. As a result, some courts permitted discovery of the information even though such information was inadmissible. See *Light* v. *State*, 560 N.Y.S.2d 962, 965 (N.Y. Ct. Cl. 1990). In 1991 Congress amended § 409 to make clear that the protected material was neither discoverable nor admissible in evidence. H.R. Conf. Rep. No. 102-404, at 332 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1679, 1712.

In addition, throughout the 1990s some court decisions had undermined § 409's basic purpose by concluding that it did not protect the "raw data" that formed the bases of the reports that States would submit to the federal government when applying for federal funds.[5] In 1995, Congress corrected these misinterpretations by amending the statute to protect information "compiled or collected," whereas before the statute had only said that information "compiled" was protected. Congress intended the change to protect precisely the "raw data" that State courts had been disclosing and

[5] *See, e.g.*, *Wiedeman* v. *Dixie Elec. Membership Corp.*, 627 So. 2d 170, 173 (La. 1993) (holding that previous version of § 409 protects a state's end-product analysis of data, but not the "unedited factual material" collected to produce the end product); *Southern Pac. Transp. Co.* v. *Yarnell*, 890 P.2d 611, 613 (Ariz. 1995) (holding that pre-1995 version of § 409 does not protect the accident reports that are themselves compiled pursuant to § 409).

admitting into evidence. H.R. Rep. No. 104-246, at 59 (1995), *reprinted in* 1995 U.S.C.C.A.N. 522, 551. Specifically, Congress intended to protect more than the formal report that regulations required the States to submit to the federal government. See, *e.g.*, 23 C.F.R. § 924.15. Congress also wanted to protect the data that other regulations required the States to collect in connection with the program. See, *e.g.*, *id.* §§ 924.9(a)(1), 924.13(a)(2). By fully protecting the data State and industry officials gathered, Congress ensured those officials performed their function most vigorously.

It is this last amendment, the 1995 amendment, which the Washington Supreme Court held is beyond Congress' delegated authority to enact, and which would intrude unconstitutionally on State sovereignty. According to the Washington Supreme Court, Congress lacks the authority to protect from discovery or admission into evidence highway-safety related data that are recorded not *only* to comply with federal highway safety programs, but *also* for other reasons independent of those federal programs. *Guillen* v. *Pierce County*, 31 P.3d 628, 654-55 (Wash. 2001) (Congress cannot protect "traffic and accident materials and raw data created and collected for state and local purposes, simply because they are also collected and used for federal purposes" (emphasis omitted)). To the Washington Supreme Court, it does not matter that Congress has insisted that such data be gathered by the appropriate State agency, then organized, and analyzed for the purpose of best directing federal highway funds, and has concluded that state tort litigation using such data poses a threat to the proper operation of the federal programs.

SUMMARY OF ARGUMENT

The Washington Supreme Court took an unduly narrow view of Congress' authority under the Spending, Commerce, and Necessary and Proper Clauses. First, § 409 is valid

legislation under the Spending and Necessary and Proper Clauses to protect federal spending programs from being undermined. There is no question that the federal highway safety programs themselves are valid Spending Clause legislation. Section 409 serves to promote effective use of the federal money spent through those valid programs by relieving State and industry officials who perform the critical data-gathering function from the concern that their own efforts will be used against them in suits for money damages. By freeing the data-collectors and compilers to perform their functions without inhibition, § 409 is valid legislation ensuring the "integrity and proper operation" of federal spending programs. *Salinas* v. *United States*, 522 U.S. 52, 61 (1997).

Second, in the alternative, § 409 is a valid Spending Clause condition that Congress has imposed on the receipt of federal highway safety funds. A State accepting federal highway funds undertakes the obligation, among others, to deny private plaintiffs seeking damages access to the information gathered pursuant to the federal highway programs. This condition is reasonably related to the goal of improving highway safety because it promotes the most thorough collection of data, which Congress has deemed essential to improving safety. Contrary to the Washington Supreme Court's reasoning, it does not matter that § 409 protects all data that is eventually "collected or compiled for the purpose of" complying with federal highway safety programs, including some information that would otherwise have been compiled by state officials even if the federal programs did not exist. Congress reasonably could conclude that all information germane to the highway safety effort should be protected, even if the State originally collected or compiled it for a purpose separate from the federal program. More fundamentally, even if § 409 were overinclusive in the sense that it protected some documents from disclosure that did not directly advance Congress' valid purpose, this Court has

made clear that a condition on the receipt of federal funds is not unconstitutional merely because it is overinclusive.

Third, § 409 is necessary and proper legislation pursuant to Congress' Commerce Clause power. The Washington Supreme Court fully conceded that the various federal highway safety programs are constitutional pursuant to the Commerce Clause. And there is no doubt that § 409 is a part of those programs. This Court demands respect for Congress' judgment by deferring to its chosen method of regulating matters affecting the national economy. Yet the Washington Supreme Court asserted for itself the authority to evaluate how important § 409 is to Congress' legitimate goal, and concluded that the 1995 amendment to § 409 was not an important enough part of the federal highway programs to be constitutional. If affirmed as a rule of law, the Washington Supreme Court's analysis severely threatens Congress' ability to respond comprehensively to issues of national concern.

The Washington Supreme Court's opinion not only threatens to weaken substantially Congress' authority under the various constitutional provisions discussed above, but it also further threatens a dramatic shift in the relationship between the federal and State governments. The Washington Supreme Court relied on the even broader principle of state sovereignty to strike down the 1995 amendment to § 409. Specifically, the Washington Supreme Court concluded that Congress cannot "intrude upon state sovereignty" (by protecting highway safety-related information from state court-ordered disclosure in damages suits) unless it can show "a valid and compelling federal interest" for doing so. *Guillen*, 31 P.3d at 655. The requirement that Congress must demonstrate a "compelling federal interest" before the otherwise valid exercise of Article I, § 8 authority can be imposed on the States is wholly novel. Nothing in this Court's cases discussing the constitutional significance of State sovereignty remotely supports such a rule. If accepted, this analysis would produce the bizarre result that Congress

could constitutionally limit access to this information in federal court but not State court; a rule that would encourage forum shopping. Further, such a rule would threaten not only § 409, but various other analogous federal statutes that prevent State courts from admitting into evidence certain information gathered for federal purposes.

Finally, regardless of how this Court views the constitutional questions presented, this Court should construe § 409 so that it may accomplish Congress' purposes in enacting it. *Amicus* believes § 409 is best interpreted as protecting from disclosure any information held by the State or private parties, if that information has been collected or compiled for the purpose of federal highway safety programs. And *amicus* believes that such an interpretation raises no substantial constitutional question. Nonetheless, if this Court should conclude that the broad interpretation of § 409 raises substantial constitutional questions, then this Court should opt for a permissible, and unquestionably constitutional, narrower interpretation.

At a minimum, the 1995 amendment to § 409 protects from disclosure the documents that have been collected by those State and private officials who have been charged with collecting and compiling information for analysis in compliance with federal requirements. Such a collection and compilation of raw data might be organized and maintained in a different form than the same raw data held by other government officials, such as police. Nothing in the Washington Supreme Court's opinion suggests that it would be unconstitutional for Congress to have protected the raw data that is collected, compiled, and organized by State officials complying with federal regulations. Indeed, preventing plaintiffs from accessing the files of those State officials reflects the core of the accepted purpose of § 409: preventing plaintiffs suing for damages from using the State's and industry's public safety effort to advance their case.

ARGUMENT

I. SECTION 409 IS A VALID EXERCISE OF CONGRESS' ARTICLE I, SECTION 8 POWERS.

Much of Congress' authority to legislate regarding highway safety is not in doubt. The Washington Supreme Court did not question that the federal highway safety programs themselves represent valid legislation under both the Spending Clause and the Commerce Clause. This Court has specifically held that federal highway funding programs are valid Spending Clause legislation. *South Dakota* v. *Dole*, 483 U.S. 203, 211-12 (1987). Also, because these programs promote safety on the nation's public highways, they are a valid exercise of Congress' authority under the Commerce Clause to "'regulate and protect the instrumentalities of interstate commerce.'" *Guillen*, 31 P.3d at 653 (quoting *United States* v. *Lopez*, 514 U.S. 549, 558 (1995)). Further, there is no dispute that Congress can, as it has in § 409, regulate the flow of information these valid federal programs create. Even the Washington Supreme Court conceded that Congress can validly prohibit state courts from providing plaintiffs access to information "*originally* 'compiled'—i.e., created, composed, recorded—for the *specific* purpose[s]" connected with the various federal highway safety programs. *Id.* at 655.

In addition, the preemptive effect of § 409 is not before this Court. The Washington Supreme Court correctly concluded that "Congress clearly intended that the § 409 privilege preempt state laws and court rules governing pretrial discovery and the admissibility of evidence at trial." *Id.* at 647. Yet the Washington Supreme Court allowed the preemptive effect of § 409 to color its view of the scope of Congress' authority under Article I. The state court concluded that upholding § 409 would produce "the unacceptable effect of 'sacrific[ing] the state tort scheme on the altar of the federal statutory scheme.'" *Id.* at 655

(alteration in original) (quoting *Southern Pac. Transp. Co.* v. *Yarnell*, 890 P.2d 611, 613 (Ariz. 1995)). This analysis does serious violence to the Supremacy Clause. Federal legislation's preemptive effect does not *undermine* its constitutionality; instead, preemptive effect *follows* from the fact that the legislation is constitutional. Congress may preempt any state law (including tort law) by the exercise of a given constitutional power, even if it would leave an injured party remediless. *FERC* v. *Mississippi*, 456 U.S. 742, 759 (1982); *Norfolk S. Ry.* v. *Shanklin*, 529 U.S. 344, 352-53 (2000); *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 874 (2000). The preemptive effect of § 409 has no bearing on the extent of the constitutional powers granted to Congress.

The only question before this Court, then, is whether Congress had constitutional authority to enact the 1995 amendment to § 409, which prohibits state courts from providing plaintiffs access to information that was originally created for some purpose unconnected with federal highway safety programs, but that was later "collected" pursuant to those programs. The 1995 amendment to § 409 is constitutional either because it is necessary and proper to valid Spending Clause legislation, or because it is itself a valid Spending Clause condition, or because it is a valid exercise of Congress' Commerce Clause power. Any one of these three grants of authority amply supports § 409.

Spending Clause: Section 409 is a substantive rule of law, applicable in all federal and state courts, that encourages thoroughness by precluding access to, use of, or reliance upon data and analysis "collected or compiled" for purposes of complying with federal highway safety programs.

Section 409 does not apply only in State courts sitting in States that accept federal funds. Instead, Congress protected the information "compiled or collected" pursuant to federal highway safety programs from disclosure in any "Federal or State court proceeding." By its terms, § 409 limits the use of

this information in *all* courts, whether or not the forum State accepts federal highway funds.

Section 409, then, is best understood as legislation Congress has deemed necessary and proper to ensure the most efficient use of federal highway safety funds. The constitutional validity (under the Spending Clause) of the federal highway programs themselves is not open to question. Section 409, which is "auxiliary to incontestable national power," *Greenwood* v. *United States*, 350 U.S. 366, 375 (1956), is valid pursuant to the Necessary and Proper Clause.

The Necessary and Proper Clause has been interpreted to support just this sort of legislation in the past. The Necessary and Proper Clause supports Congress' power to exempt federal agencies from State taxation; for it is clear that Congress may "preserve and protect functions validly authorized." *Carson* v. *Roane-Anderson Co.*, 342 U.S. 232, 234 (1952). Likewise, the Rules Enabling Act, 28 U.S.C. § 2072, which provides that the federal courts may establish their own procedural rules, has been held to be "necessary and proper" to Congress' power to create the lower federal courts. *Willy* v. *Coastal Corp.*, 503 U.S. 131, 136 (1992). It is "necessary and proper" precisely because it is legislation that will help to ensure uniformity in administrative matters, leading to broad, system-wide efficiency in adjudication. *Hanna* v. *Plumer*, 380 U.S. 460, 472-73 (1965). As these cases make clear, legislation that reflects Congress' judgment of how to ensure the most effective use of its delegated powers lies at the core of the Necessary and Proper Clause. *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.").

Section 409, including the 1995 amendment, is but one example of Congress legislating, pursuant to the Necessary

and Proper Clause, to ensure the integrity and proper implementation of federal spending programs. See, *e.g.*, 18 U.S.C. § 285 (prohibiting the taking or using of papers relating to claims for federal payment); *id.* § 286 (prohibiting conspiracy to defraud the United States with respect to claims); *id.* § 287 (federal criminal false claims act); *id.* § 666 (prohibiting bribery of agents of, and theft from, organizations supported by federal funds). As with those statutes, Congress expressly limited § 409 to protect the integrity of the federal spending programs at issue. Congress did not extend federal protection to all highway safety data and documents, but only those:

> reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying[,] evaluating, or planning the safety enhancement of potential accident sites ... *pursuant to sections 130, 144, and 152 of this title* or for the purpose of developing any highway safety construction improvement project which *may be implemented utilizing Federal-aid highway funds*.

23 U.S.C. § 409 (footnote omitted; emphases added).

This Court upheld the constitutionality of analogous legislation in *Salinas* v. *United States*, 522 U.S. 52 (1997). In that case, a county jail received federal funds in return for housing federal prisoners. A deputy sheriff took bribes from a prisoner in return for allowing the prisoner to have contact visits with his wife or girlfriend. The sheriff was convicted under 18 U.S.C. § 666(a)(1)(B), which declares unlawful any bribe to an agent of an organization receiving federal assistance. This Court held that the validity of § 666(a)(1)(B) is not limited to cases where the bribe affected federal funds and concluded that "there is no serious doubt about the constitutionality of § 666(a)(1)(B) as applied to the facts of this case." *Salinas*, 522 U.S. at 60. The conviction was deemed valid because the defendant who had offered the bribes was "a prisoner held in a jail managed pursuant to a ... [federal] agreement[]," and his bribery constituted "a threat to

the integrity and proper operation of the program." *Id.* at 60-61. If Congress can impose criminal sanctions upon individuals to ensure "the integrity and proper operation" of federal spending programs, *a fortiori* it can impose discovery and evidentiary restrictions to protect the integrity and proper operation of federal spending programs on individuals bringing tort claims. See also *Legal Tender Case*, 110 U.S. 421, 449-50 (1884) (statute making treasury notes legal tender is necessary-and-proper legislation incidental to Congress' power "'to pay the debts and provide for the common defense and general welfare of the United States'").

In reasoning to the contrary, the Washington Supreme Court held that Congress was entitled to protect "materials that would not have been created but-for federal mandates," but not materials that were either created for both federal and state or local purposes, or were created originally for state and local purposes and later compiled or collected for the federal highway program. *Guillen*, 31 P.3d at 654. But it is for Congress to "exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government." *McCulloch*, 17 U.S. (4 Wheat.) at 421. Recognizing that data analysis is vital to the operation of federal highway safety programs that have saved thousands of lives, Congress, not the courts, has the right to decide what level of protection to extend to data collected or compiled for such programs, and to weigh the overall public benefits of such protections against the costs to some tort plaintiffs who may be restricted in the evidence they can discover or introduce into evidence in litigation.

And Congress had good reasons to legislate as it did. For data collected only in part for federal purposes (such as accident reports), Congress could reasonably conclude that the data collection and analysis that is vital to each of the federal programs would be skewed by fears of tort litigation. Congress is not compelled to overlook this risk simply because there may be an independent state and local purpose

for creating accident reports. For data originally created for local purposes, but is subsequently collected or compiled for use in connection with federal highway safety programs, Congress could reasonably conclude that states, localities, and other participants in the federal programs would not make the best use of available data for fear that a systematic, centralized repository of safety data would provide the plaintiff's bar a "virtually no-work[] tool for direct use in private litigation." *Light*, 560 N.Y.S 2d at 965; *Harrison* v. *Burlington N. R.R.*, 965 F.2d 155, 160 (7th Cir. 1992); *Robertson* v. *Union Pac. R.R.*, 954 F.2d 1433, 1435 (8th Cir. 1992); *Reichert* v. *State, Dep't of Transp. & Dev.*, 694 So. 2d 193, 197 (La. 1997). Indeed, Congress was no doubt aware of the substantial risk that private litigants would use such systematic collections of accident data to establish knowledge of the danger of a highway location or railway-highway crossing, as respondents have attempted to do here. Pet'r. Br. 41-42.

Because Congress enacted § 409 pursuant to its authority to enact legislation "necessary and proper for carrying into Execution" its Spending Clause powers, U.S. Const. art. I, § 8, cl. 18, there is no need to apply the analysis of *South Dakota* v. *Dole*, 483 U.S. 203 (1987), which addresses the power of Congress to append conditions to spending grants to achieve goals that Congress could not legislate directly. *Id.* at 206-07. But if this Court were to conclude that section 409 is a Spending Clause condition, then it should readily conclude that § 409 is a *valid* Spending Clause condition.[6]

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[6] All 50 states and the District of Columbia accepted federal highway funds in the year 2000, and thus all states may be deemed to have voluntarily accepted that § 409 applies to them. *See* Federal Highway Admin., U.S. Dep't of Transp., *Allocation of Federal Funds Administered by Federal Highway Administration for Fiscal Year 2000*, *at* http://www.fhwa.dot.gov/ohim/hs00/fa4d.htm (visited June 19, 2002) (detailing amounts of federal-aid highway funds received by State).

Congress has broad power to impose conditions upon a state's voluntary receipt of federal funds. The reason is simple. When the receipt of federal funds is the product of a state's voluntary choice, any conditions attached to those funds are themselves accepted by the state voluntarily as well. *Barnes* v. *Gorman*, 122 S. Ct. 2097, 2100-01 (2002) (Spending Clause conditions are akin to contracts which the States voluntarily make with the federal government). Far from an affront to principles of federalism, Spending Clause conditions respect those principles by permitting federal and state governments to cooperate in advancing the general welfare. *New York* v. *United States*, 505 U.S. 144, 167-68 (1992).

This Court set forth a four-part framework for analyzing the validity of Spending Clause legislation: (1) "the exercise of the spending power must be in pursuit of the 'general welfare,'" (2) the condition must be unambiguous, (3) the condition must be related "'to the federal interest in particular national projects or programs,'" and (4) the condition must not fun afoul of any other independent constitutional limit on Congress' power. *Dole*, 483 U.S. at 207-08. Only parts three and four[7] of the *Dole* test warrant discussion.

The Washington Supreme Court argued that the 1995 amendment to § 409 failed to advance any federal interest, thus effectively concluding that it failed part three of the *Dole* test. The state court, relying largely on the dissenting opinion in *Dole*, believed that the 1995 amendment advanced no federal interest because it is overinclusive. Although it acknowledged that many kinds of data were properly protected, the court below:

> f[ound] no valid federal interest in the operation of the federal safety enhancement program is reasonably

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[7] The only conceivable limitation independent of the Spending Clause analysis discussed here is the State sovereignty argument addressed in Part II below.

> served by barring the admissibility and discovery in state court of accident reports and other traffic and accident materials and 'raw data' that were originally prepared for routine state and local purposes, simply because they are 'collected,' for, among other reasons, pursuant to a federal statute for federal purposes.

Guillen, 31 P.3d at 651 (emphasis omitted).

The court's analysis is wrong. First, there is nothing fatally overinclusive in protecting all data and reports "compiled or collected for the purpose of" highway safety evaluations, which are conducted "pursuant to" federal statute. 23 U.S.C. § 409. As discussed above, even when data was originally created in whole or part for independent state or local purposes, Congress had valid reasons for extending federal protection to that data insofar as it was collected or compiled in connection with federal spending programs.

Further, as *Dole* makes clear, any overinclusivity is constitutionally irrelevant. In *Dole*, the Court found that the relationship between a uniform drinking age and Congress' goal of promoting safe use of federally funded highways was sufficiently close to satisfy the Spending Clause. 483 U.S. at 208-09. The fact that the drinking age condition was overinclusive did not lead the Court to invalidate it. See *id.* at 214-15 (O'Connor, J., dissenting) (noting that drinking age restriction was overinclusive because it stopped youths from drinking even when they were not planning on driving). Though this Court in *Dole* left open precisely how closely related a condition must be to Congress' legislative purpose, *id.* at 208 n.3, the facts of *Dole* make clear that if the condition advances the goal, the fact that it is overinclusive does not invalidate the condition.

Here, the state court did not deny that Congress can require the states to engage in extensive data-gathering and analysis as a condition on receiving federal highway funds. Moreover, the court never denied that protecting the results of those

efforts from use in litigation advances Congress' valid goal of ensuring safety through thorough, uninhibited data-gathering and analysis. And the court did not reject the 1995 amendment in its entirety; § 409, in the court's view, exceeds Congress' Spending Clause power only as it applies to raw data *not* originally created exclusively to comply with federal highway programs. *Guillen*, 31 P.3d at 655. The Washington Supreme Court never denied that the 1995 amendment to § 409 advances Congress' legitimate interests. The court simply concluded that it swept in too much material, and struck down the amendment in its entirety. This is contrary to *Dole*.

Congress wanted states and private entities to be free of concern over how the data they were collecting and analyzing might subsequently be used by private litigants. The 1995 amendment advances that goal. The Washington Supreme Court, employing a narrow view of Congress' Spending Power contrary to *Dole*, has undermined that purpose. The decision below should be reversed.

Commerce Clause. Under the Commerce and Necessary and Proper Clauses, Congress has broad power to regulate activities that affect interstate commerce by "all means ... which are appropriate and plainly adapted to the permitted end." *United States* v. *Darby*, 312 U.S. 100, 124 (1941). The Washington Supreme Court has badly misread this Court's decisions in *Hodel* v. *Indiana*, 452 U.S. 314 (1981), *United States* v. *Lopez*, 514 U.S. 549 (1995) and *United States* v. *Morrison*, 529 U.S. 598 (2000), as severely constraining Congress' Commerce Clause power. The Washington Supreme Court has asserted that these cases direct lower courts to examine the individual components of complex statutory schemes that relate to interstate economic activity and to invalidate any specific statutory provision of the scheme that in its judgment does not directly advance a legitimate Commerce Clause goal. If allowed to stand, the Commerce Clause analysis of the Washington Supreme Court

could potentially prevent Congress from responding in a comprehensive way to matters affecting the national economy. This Court should correct the state court's undue narrowing of congressional power.

This Court has recently reaffirmed that the Commerce Clause authorizes Congress to "'regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities.'" *Morrison*, 529 U.S. at 609. Further, this Court has recognized that Congress may "'regulate those activities having a substantial relation to interstate commerce.'" *Id.* Congress has specifically concluded that the inadequacies of the highway system have an impact on interstate commerce. 23 U.S.C. § 101(b); S. Rep. No. 89-1302, *reprinted in* 1966 U.S.C.C.A.N. at 2743 (noting that in 1966, when Congress began the data-driven approach, highway accidents cost the nation some $8.5 billion).

In *Hodel*, the Court described how courts should assess Commerce Clause challenges to particular components of far-reaching regulatory schemes. The district court in *Hodel* had concluded that 15 different provisions of the Surface Mining and Reclamation Control Act of 1977 could have been justified as Commerce Clause legislation only with respect to how they helped reduce air and water pollution. 452 U.S. at 322-23. The party challenging the Act argued that several of these provisions do not contribute to either of these ends. *Id.* at 329 n.17. The Court rejected the claim:

> A complex regulatory program ... can survive a Commerce Clause challenge without a showing that every single facet of the program is independently and directly related to a valid congressional goal. It is enough that the challenged provisions are an integral part of a regulatory program and that the regulatory scheme when considered as a whole satisfies this test.

Id.

Following *Hodel*, court review should focus on the scheme as a whole. The general orientation is one of deference to Congress' chosen methods to respond comprehensively to matters affecting the national economy. "It is not for [courts] to say whether the means chosen by Congress represent the wisest choice. It is sufficient that Congress was not irrational in concluding that limited federal regulation ... was essential to protect interstate commerce." *FERC*, 456 U.S. at 758; *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 261-62 (1964) (the structure of a federal regulatory scheme that is, as a general matter, constitutional "is within the sound and exclusive discretion of Congress"). The Washington Supreme Court correctly recognized that the federal highway safety programs are valid "'when considered as a whole.'" *Guillen*, 31 P.3d at 654. Following *Hodel* and *Heart of Atlanta Motel* and *FERC* v. *Mississippi*, the court should then have deferred to Congress' chosen method of achieving its legitimate objective.

Instead, the Washington Supreme Court took a wrong turn. It seized on the language in *Hodel* indicating that the various components of a regulatory program must all be "integral" to the program's operation to authorize aggressive judicial review of Congress' chosen means to achieve its legitimate ends. It claimed that this Court's recent decisions in *Lopez* and *Morrison* supported its novel reading of *Hodel* because in those decisions this Court had "eroded" the "precedential authority" that would require courts to defer to Congress on matters affecting state sovereignty. *Id.* at 653.

The court ultimately concluded that § 409 was not an "integral part" of the federal highway safety programs because the court could not "see how [any] federal purposes are reasonably served by also barring the discovery and admissibility in state court of routinely prepared state and local traffic and accident materials and data that would exist even had a federal safety enhancement program never been created." *Id.* at 654. Put another way, the court interpreted

the "integral part" language in *Hodel* to require lower courts to examine whether any challenged component of a federal regulatory program itself independently and directly serves a valid Commerce Clause purpose. *Hodel* was thus read to contradict itself.

Nothing in this Court's cases permits reading *Hodel* to undermine itself. *Lopez*, for example, reaffirmed the long-recognized view, that "'where a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.'" 514 U.S. at 558 (emphasis omitted) (quoting *Maryland* v. *Wirtz*, 392 U.S. 183, 197 n.27 (1968)). As this Court said in *Perez* v. *United States*, 402 U.S. 146, 154 (1971) (emphasis omitted): "Where the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class."[8] Similarly, where a regulatory program as a whole is within Congress' Commerce Clause power, the courts have no power to excise, as trivial, individual components of the program.

Under a properly deferential standard, the 1995 amendment to § 409 is constitutional. It is sufficiently connected to Congress' effort to promote highway safety, and thereby protect the channels of interstate commerce, to satisfy the "integral part" standard of *Hodel*. As a component of the

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[8] *Morrison* carved out a narrow exception. This Court refused to allow Congress to aggregate the effects on commerce of violent criminal conduct to authorize federal regulation of such conduct. 529 U.S. at 617-18. This case, of course, involves nothing of the sort. *Morrison* reaffirmed that Congress Commerce power is at its strongest when it regulates commercial activity. *Id.* at 610. And *Morrison* reaffirmed that the Commerce Clause empowers Congress to "'regulate and protect the instrumentalities of interstate commerce ... even though the threat may come only from intrastate activities.'" *Id.* at 609. Keeping the highways clear of the obstructions created by accidents is vital regulation of the channels of commerce.

legislative scheme promoting highway safety, Congress may ensure that public and private officials are not deterred from providing the most thorough collection and analysis of safety related data. *City of Atlanta* v. *Watson*, 475 S.E.2d 896, 903 (Ga. 1996) (federal provision privileging noise exposure maps created in compliance with federal Noise Abatement Act is "integral part" of federal program). Section 409 is an "integral part"—a part that reasonably (even if indirectly) promotes the ultimate aim—of a lawfully enacted regulatory scheme. Congress, therefore, has the authority to enact it.

II. SECTION 409 DOES NOT OFFEND PRINCIPLES OF STATE SOVEREIGNTY.

The Washington Supreme Court's decision contains an alternative line of reasoning even more out of step with this Court's decisions than its narrow reading of Congress' powers under Article I. The state court concluded that this Court's recent cases highlighting the importance of State sovereignty in our federal system requires Congress to demonstrate a "compelling federal interest" when it "intrude[s] upon state sovereignty by barring state and local courts from admitting [raw data related to federal highway safety programs] into evidence." *Guillen*, 31 P.3d at 655. The application of strict scrutiny to Congress' decision to impose a rule of law upon state courts pursuant to the Supremacy Clause reflects a profound misreading of this Court's State sovereignty decisions.

A federal statute enacted pursuant to one of Congress' Article I powers may nevertheless be invalid if it intrudes upon the fundamental principles of State sovereignty embodied in the Constitution. For example, Congress may not abrogate a State's sovereign immunity from damages suits by private individuals even when such a statute is otherwise a part of valid commerce clause legislation. See, *e.g.*, *Alden* v. *Maine*, 527 U.S. 706, 732 (1999). Likewise, Congress may not commandeer state officials either to "issue directives requiring the States to address particular problems, nor [may

Congress] command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." *Printz* v. *United States*, 521 U.S. 898, 935 (1997); *New York*, 505 U.S. at 162. If a statute violates these fundamental principles of State sovereignty, the statute is invalid; this Court has never examined the statute to determine if the federal interest involved is sufficiently "compelling" to overcome the sovereignty interest of the State.

So the state court was wrong to seek out a "compelling federal interest" that might validate a fundamental intrusion on State sovereignty. But, even more fundamentally, the state court was wrong to conclude that § 409 intrudes upon State sovereignty at all. Section 409 does not represent an attempt by Congress to abrogate State sovereign immunity. Neither has Congress sought to "commandeer" state officials in carrying out the tasks necessary to improve highway safety. Congress has instead solicited the cooperation of State officials to perform the crucial data-gathering function; no State official need perform any administrative task unless the State voluntarily chooses to accept federal money.

Section 409 merely requires that State courts respect the privilege Congress has enacted in § 409. That is, § 409 is nothing more than federal rule of law equally applicable in federal and State court. If such a rule represents an intrusion on State sovereignty, then *every* federal rule of law that State courts must enforce pursuant to the Supremacy Clause reflects an intrusion on State sovereignty, and is therefore subject to attack even if the rule of law is clearly within Congress' Article I powers to enact.

Were the Washington Supreme Court correct, numerous federal statutes could be left applicable only in federal court, not in State court, creating precisely the system of inconsistent enforcement that the Supremacy Clause was designed to prevent. There are a number of transportation-related federal statutes that purport to prevent State as well as federal courts from introducing into evidence certain

documents relevant to federal programs. See, *e.g.*, 49 U.S.C. § 504(f) (motor carrier accident reports); *id.* § 20903 (railroad accident reports); *id.* § 47507 (noise exposure maps in connection with airports). The Washington Supreme Court would invite courts throughout the nation to determine whether the federal interest reflected in these, and myriad other statutes, is sufficiently "compelling" to require State as well as federal court enforcement. That inverts the constitutional design reflected in the Supremacy Clause.

The Supremacy Clause was designed to resolve conflicts between State and federal law in favor of the federal rule. *Public Utils. Comm'n* v. *United States*, 355 U.S. 534, 544 (1958); *Testa* v. *Katt*, 330 U.S. 386, 390-91 (1947); *McCulloch*, 17 U.S. (4 Wheat.) at 427 ("It is of the very essence of supremacy, to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments ...."). To be sure, the Supremacy Clause does not override the fundamental sovereignty interests of the States that were preserved in the constitutional design. *Alden*, 527 U.S. at 732. But the constitutional design did not reserve so much sovereign authority to the States that every federal rule of law must be shown, to the satisfaction of a court, to advance a "compelling federal interest" before that rule is binding on State court decisions as well as federal. *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 552 (1985) ("State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power."). As this Court recently reaffirmed, the principle of State sovereignty does not prevent Congress from "'regulat[ing] state activities'"; rather, the principle of State sovereignty prevents Congress from "'seek[ing] to control or influence the manner in which States regulate private parties.'" *Reno* v. *Condon*, 528 U.S. 141, 150 (2000) (second alteration in original) (quoting *South Carolina* v. *Baker*, 485 U.S. 505, 514-15 (1988)).

III. THIS COURT SHOULD GIVE SECTION 409 A NATURAL CONSTRUCTION SUFFICIENT TO ACCOMPLISH ITS PURPOSES.

Respondents and the concurring justice below have taken the position that § 409 does not protect discovery from the "original source" of an accident report, if that original source did not collect the information pursuant to federal statutory mandates. *Guillen*, 31 P.3d at 659 (Madsen, J., concurring); Br. Opp. 17-19.

There is no reason to adopt such a constricted reading of the statute. Congress has concluded that the best way to promote the most thorough compilation and collection of accident information is to ensure that such information is not used to impose monetary damages on those collecting and compiling it. To accomplish that goal, Congress protected the *information* from disclosure or admission into evidence. As Congress explained, the "raw data" itself was being included within the protection of § 409 – any "raw data" that would be "made part of any formal or bound report" created pursuant to federal highway safety statutes. H.R. Rep. No. 104-246, at 59, *reprinted in* 1995 U.S.C.C.A.N. at 551. Congress did not distinguish between "raw data" originally created to comply with federal highway safety programs, and other raw data relevant to those programs that was originally created for other purposes.

This Court, in a similar context, also refused to draw such a distinction. In *John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146, 154-55 (1989), this Court held that a FOIA exemption for documents "compiled for law enforcement purposes" includes documents originally created for another purpose but which the government later compiled for law enforcement purposes, and thus prevents disclosure even by the separate government department that originally created it. As this Court recognized, "the word 'compile' naturally ... refer[s] even to the process of gathering at one time records and information that were generated on an earlier occasion and for

a different purpose." *Id.* at 154. Consistent with *John Doe Agency*, the best reading of § 409 would protect all the raw data that is "collected and compiled" to comply with federal highway safety statutes, whatever the reason for its original creation, and wherever that raw data is held within the State. Moreover, the doctrine of constitutional avoidance cannot be invoked to reject this natural reading of the statute. That doctrine only applies when the best reading of the statute raises "'grave and doubtful constitutional questions,'" *Jones* v. *United States*, 526 U.S. 227, 239 (1999), and as discussed above no such grave doubts are raised in this case.

Even if this Court were inclined to construe section 409 narrowly to permit discovery of information from an "original source" with no connection to a federal highway safety program, it should make clear the limits of any such "original source" exception. First, even if the data was originally collected exclusively for unrelated purposes, in all events the subsequent collection and compilation for purposes of implementing federal highway safety programs would be entitled to § 409 protection. In other words, even under a narrow view of § 409, the plaintiff could only seek discovery from an entity that separately holds the data or reports for purposes unrelated to the federal program. Thus, here, respondents would not be entitled to discovery of materials from the Pierce County Public Works Department, even if *arguendo* it could seek discovery from independent sources. See Petr. Br. 46-47.

Second, and relatedly, if an entity's collection or compilation of data or reports is used in any part for the purpose of federal highway programs, the entire collection or compilation is protected by § 409. Thus, the Washington Supreme Court is indubitably correct that a plaintiff cannot demand discovery of the data in a single electronic database of accident reports that is used in part for federal highway safety programs, and in part for law enforcement purposes. *Guillen*, 31 P.3d at 645-46. Nor could a plaintiff demand

access to a railroad's files, reports, or databases simply because they are used for operational purposes as well as for the Section 130 program. The protection of the federal interest is paramount.

Third, if the original collection of data is in any part for the purpose of implementing federal highway safety programs, § 409 applies. Here, the State of Washington has adopted regulations defining the content of accident reports in order to comply with the mandates of federal highway safety statutes, Wash. Admin. Code §§ 136-28-010, 136-28-030, and thus all accident reports (whether created by local sheriffs or the state highway patrol) are subject to the protections of § 409 because they were "collected or compiled" pursuant to those regulations. So even if there were a separately held collection of accident reports held by the state highway patrol, plaintiffs would not be entitled to discovery. Similarly, any data or reports that the railroad collects or compiles in part for the purpose of the Section 130 program are protected under § 409, even if the railroad also collects such data for its own internal purposes.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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